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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-74

GEORGE E. BARRETT, ET AL., PETITIONERS

v.

ROBERT KUNZIG, AS ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a-19a) is not yet reported. The opinion of the district court (Pet. App. 1a-17a) is reported at 331 F. Supp. 266.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1972, and a petition for rehearing was denied on April 14, 1972. The petition for a writ of certiorari was filed on July 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution is violated by the building security program of the General Services Administration, which conditions entry into a United States court house upon either the submission of packages and briefcases to a cursory visual inspection for firearms or explosives, or the checking of such packages, uninspected, with the security guards.

2. Whether the denial of class action status as to spectators or litigants was proper.

STATEMENT

This lawsuit challenges the security procedures instituted for the United States Court House in Nashville, Tennessee on June 15, 1971, pursuant to a directive from the General Services Administration.[1] As a result of damage to federal property both in the Southeast and nation-wide, the General Services Administration (GSA) issued instructions requiring federal building guards to examine packages and briefcases of individuals entering the federal courthouse for the possible presence of explosives. As implemented by local procedure, persons declining to open their packages or briefcases for inspection are allowed to leave their packages, uninspected, at the security desk and proceed freely within the court

[1] Although the federal building in Nashville is referred to as the United States Court House, it also includes the offices of Tennessee's two Senators, a Congressman, the Internal Revenue Service, Veterans Administration, and the F.B.I., among other governmental agencies (Pet. App. 3a).

house.[2] Persons entering the building are advised of the inspection procedure by a sign stating: "Notice—Open all packages, briefcases, etc. for inspection at Insp. Station," clearly posted at each entrance to the building (Pet. App. 6a).

On June 15, 1971, the first day of the new safety measures, petitioner George Barrett, an attorney, entered the building to attend a 9 a.m. hearing. Barrett declined to have his briefcase inspected (Pet. App. 6a). He also declined to carry the briefcase uninspected, in the company of a federal protective officer. Instead he left his briefcase at the inspection station and was allowed full access to the court house (T. 8; Pet. 6–7). Petitioner Omer Galle, a prospective spectator at one of Barrett's trials, also declined to have his briefcase inspected. Galle chose—and was allowed—to leave the court house without inspection (T. 12; Pet. 7). Others submitted their briefcases to inspection and proceeded into the court house (T. 32–33, 47–49; Pet. 7).

Seeking declaratory and injunctive relief, this suit was brought by petitioners in their individual capacities as well as representatives of their respective "classes" under Rule 23 of the Federal Rules of Civil Procedure. The district court found that while persons who are litigants in the United States District Court at Nashville constitute an identifiable class, their

[2] Petitioner Barrett was given an additional option of carrying his briefcase with him without inspection, but accompanied by a security guard (Pet. App. 7a).

Federal employees with proper identification are not subject to inspection.

interests were not fairly and adequately protected by the plaintiff litigants and therefore ruled that the action was not maintainable as a class action as to them. Similarly, the court found that the petitioner spectator did not fairly and adequately protect the interests of all spectators and that there was no need for a class of spectators as distinguished from any person entering the building to use its facilities. The district court did find that the suit was maintainable as a class action on behalf of all attorneys admitted to practice before the district court (Pet. App. 1a–3a). On the merits the district court found no violation of the First, Fourth or Sixth Amendments and dismissed the complaint (Pet. App. 8a–17a). The court of appeals affirmed (Pet. App. 18a–19a) on the basis of its opinion in *Downing* v. *Kunzig,* No. 71–1493 (Pet. App. 20a–26a).

ARGUMENT

1. The security procedures instituted at the United States Court House in Nashville, Tennessee, are reasonable and offend no constitutional right of petitioners or any alleged class they may represent. It is important to note the significant factual differences between these building security procedures and "searches and seizures" as they are commonly made in law enforcement. While the Nashville court house is a public building it is also government property which the GSA is charged with maintaining and protecting (40 U.S.C. 318). Measures taken to protect such property are qualitatively different from governmental measures affecting the public at large like

administrative inspections, and from police searches reaching people on the street or in their homes. Also it is significant that the "searches" complained of are not forcible entries. Rather, the access to the public facility is conditioned on submitting large packages to a casual visual inspection. There is a large sign advising anyone entering the building of the inspection procedures. If he does not wish to submit to the inspection, he is free at any time to leave, or he may both avoid inspection and gain the use of the facility by checking his package, uninspected, with the security guards. It is hard to imagine a more reasonable response to a very real threat to security of government property and the safety of its employees.

The Nashville court house is the property of the United States. Congress's power with respect to such property is governed by Article IV, Section 3 of the Constitution:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; * * *.

Congress has delegated to the GSA Administrator the authority to appoint uniformed guards having the same powers as sheriffs and constables upon federal property "to enforce any rules and regulations made and promulgated by the Administrator * * * for the property under their jurisdiction" (40 U.S.C. 318). The delegation contained in 40 U.S.C. 318 was upheld against constitutional challenge in *United States* v. *Cassiagnol,* 420 F.2d 868 (C.A. 4), certiorari denied, 397 U.S. 1044. In upholding the constitutionality of

regulations promulgated pursuant to this statute, the court said (420 F.2d at 875):

> Even where government property is generally open to the public, reasonable nondiscriminatory regulation is appropriate to prevent interference with the designated and intended governmental use thereof.

One "reasonable nondiscriminatory regulation" which the GSA has promulgated pursuant to Congressional delegation is 41 C.F.R. 101–19.311:

> *Weapons and Explosives.*
>
> No person while on property shall carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, except for official purposes.

The challenged security measures are a reasonable implementation of this reasonable regulation. The regulation protects the physical safety of federal employees and federal property, but perhaps more importantly in a very real sense preserves citizen access to federal agencies. Its object is equally to protect the persons using federal facilities and to prevent the interruptions to the government processes—including judicial proceedings—that have been caused by bombings (see Pet. App. 4a–5a, 20a).

Even if these security measures can be said to constitute "searches" within the meaning of the Fourth Amendment, it does not follow that a warrant or probable cause to suspect the contents of each package must precede each inspection. While a warrant is required "except in certain carefully defined classes of cases * * *" (*Camara* v. *Municipal Court,* 387 U.S.

523, 528), these inspections fall within those "carefully defined classes of cases" in which warrantless searches are permissible. The question of whether a warrant is required "depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara, supra,* 387 U.S. at 533). In *Camara* the Court concluded that requiring building inspectors to obtain search warrants would not frustrate the building inspection program because there was "no compelling urgency to inspect at a particular time or on a particular day" (387 U.S. at 539). By contrast the inspections at the court house door must be carried out, if at all, when entrance is sought. Manifestly it would be unreasonable, in each instance, to detain persons seeking to enter the court house until a warrant could be obtained. A warrant requirement here would plainly "frustrate the governmental purpose."

Similarly the fact that the security guards lack probable cause to suspect firearms or explosives in each package inspected does not invalidate the procedures. In *Camara* this Court recognized that in administrative searches the justification for inspection is often "unavoidably based on [the agency's] appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular [instance]" (387 U.S. at 536). In that case the Court found that sufficient "probable cause" to inspect a particular building exists whenever "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particu-

lar dwelling" (387 U.S. at 538). So here the justification of a particular inspection is found in the "conditions in the area as a whole," rather than any particularized knowledge about an individual briefcase.

Furthermore the intrusion involved in each inspection is minimal. The guards make only cursory visual inspection for firearms or explosives. No evidence at trial suggested that the guards read or sought to read any papers. Moreover, the individual may avoid even this minimal intrusion by leaving the package unopened with the guards (who do not inspect such packages (Pet. App. 7a)). Accordingly, these inspection procedures do not violate the Fourth Amendment.[8]

[8] The problem of air piracy has given rise to similar security measures. The use, at airports, of magnetometers to detect possible hidden weapons, and searches of passengers who activate the mechanism, has been sustained by all courts considering the matter. *United States* v. *Slocum*, No. 72-1231, C.A. 3, decided July 19, 1972; *United States* v. *Bell*, No. 72-1322, C.A. 2, decided July 5, 1972, pending on petition for writ of certiorari, No. 72-5192; *United States* v. *Epperson*, 454 F. 2d 769 (C.A. 4). See also *United States* v. *Lindsey*, 451 F. 2d 701 (C.A. 3), a certiorari denied, 405 U.S. 995.

Another analogous security system is the program of agricultural inspections. A criminal prosecution based on contraband seized in such inspections was recently upheld in *United States* v. *Shafer*, No. 71-1004, C.A. 9, decided June 5, 1972, pending on petition for writ of certiorari, No. 72-5040.

A final situation analogous to the cursory inspection in the instant case is the border search. Both are an exercise of the government's right to regulate the influx of items into an area which the government has a duty to protect. In a border search an individual and his possessions may be searched without probable cause or warrant if the search is otherwise reasonable. *United States* v. *Warner*, 441 F. 2d 821 (C.A. 5); *United States* v. *Weil*, 432 F. 2d 1320 (C.A. 9); *Walker*

The claim that the right to privacy guaranteed by the First, Fifth and Ninth Amendments is also allegedly violated adds nothing to petitioners' Fourth Amendment arguments. The interests protected are essentially the same. See *Berger* v. *New York*, 388 U.S. 41; *Camara* v. *Municipal Court, supra;* and *Warden* v. *Hayden*, 387 U.S. 294.

The Sixth Amendment rights to counsel and to public trial are in no way disturbed by the inspection procedure. No breach in the confidential relationship of attorney and client has been demonstrated. Materials in the briefcase are not read. Similarly, the inspection requirement, which we contend is reasonable and justified, has not been shown to have any significant effect on the ability of spectators to attend trials. The options set forth above indeed even obviate the need for this minimal inspection, if an attorney or a would-be spectator objects.

2. The class action rulings were proper and call for no further review as to both the class of spectators and the class of litigants. The district court found in its opinion, upon which we rely (Pet. App. 1a–3a), that neither petitioner could fairly and adequately represent or protect the interests of these "classes."

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v. *United States*, 404 F. 2d 900 (C.A. 5); and *United States* v. *Nunez-Martinez*, 443 F. 2d 403 (C.A. 9). They may be conducted on mere suspicion. *United States* v. *Glaziou*, 402 F. 2d 8 (C.A. 2). They may be conducted on a random basis. *United States* v. *Stornini*, 443 F. 2d 833 (C.A. 1). They may also be conducted merely because a person crosses the border. *Henderson* v. *United States*, 390 F. 2d 805 (C.A. 9) and *United States* v. *Summerfield*, 421 F. 2d 684 (C.A. 9).

In addition, as the court stated, the necessity for a separate class of spectators as distinguished from any person using the building was not shown. The petitioners were allowed to press the suit individually (with petitioner Barrett representing the class of attorneys). Since they were seeking declaratory and injunctive relief, the class action questions were of minimal practical importance to the suit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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